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Supreme Court of the United States

OCTOBER TERM, 1954

No. 31

BALTIMORE CONTRACTORS, INC., PETITIONER,

vs.

JACOB H. BODINGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 8, 1954

CERTIORARI GRANTED APRIL 12, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

BALTIMORE CONTRACTORS, INC., PETITIONER,

vs.

JACOB H. BODINGER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 13508

JACOB H. BODINGER, Appellee,

against

BALTIMORE CONTRACTORS, INC., Appellant

NOTICE OF MOTION TO DISMISS APPEAL

SIRS:

Please take notice, that upon the Notice of Appeal herein, upon the order of Judge Walter J. Bruchhausen, of the United States District Court for the Eastern District of New York, dated the 4th day of November, 1953, and upon the annexed affidavit of Bernard I. Scherer, sworn to the 1st day of December, 1953, the undersigned will move this Court at a stated term thereof, to be held in the Court Room at the United States Courthouse, Foley Square, New York City, on the 7th day of December, 1953, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the appeal taken by the defendant-appellant from the order of Judge Bruchhausen dated the 4th day of November, 1953, on the ground that the said order is not appealable and that therefore this court has no juridiction of the said appeal, and granting the costs of this motion, and such other and further relief as to the Court may seem proper.

Dated, Brooklyn, N. Y., December 1st, 1953.

Yours, etc., Bernard I. Scherer, Attorney for Plaintiff-Appellee, Office and P. O. Address, 320 Broadway, Borough of Manhattan, City of New York.

To: Rosston, Hort and Brussel, Esqs., Attorney for Defendant-Appellant, 141 Broadway, New York City.

[fol. 2] AFFIDAVIT OF BERNARD I. SCHERER

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civil Action No. 13508

JACOB H. BODINGER, Appellee,

against

BALTIMORE CONTRACTORS, INC., Appellant

STATE OF NEW YORK
County of Kings, ss.

Bernard I. Scherer, being duly sworn, deposes and says:

1) I am an attorney at law, with offices at 320 Broadway, New York, N. Y., and am the attorney for the plaintiff-appellee in the above entitled action, and I am familiar with the proceedings in this action. This affidavit is made by me instead of the plaintiff-appellee since it relates to legal and procedural matters. It is made in support of the motion by plaintiff-appellee to dismiss the appeal taken herein.

2) The Notice of Appeal, copy of which is attached hereto as Exhibit "A", states that it appeals from an order denying defendant-appellant's motion for a stay of proceedings in this action.

The order from which the appeal is taken, made on the 4th day of November, 1953, copy of which is hereto annexed as Exhibit "B", shows that it denied a motion by the defendant for an order staying the prosecution of the action herein pursuant to the provisions of Section 3, of title 9, U. S. C. A., upon the alleged grounds that the agreement annexed to the complaint contains a provision for the arbitration of the disputes raised by the allegations of the complaint herein. This motion to dismiss the appeal must be [fol. 3] granted, because the order from which the appeal has been taken is neither a final decision nor an appealable interlocutory decision and therefore, this Court lacks jurisdiction of the appeal.

3) This lawsuit is an action in equity brought by plaintiff for an accounting by defendant of the profits of the joint adventure in which plaintiff and defendant had been en-

gaged, as more particularly appears from the complaint herein, copy of which is hereto annexed as Exhibit "C". The contract for the said joint adventure is annexed to the said complaint as Exhibit "1" thereof.

4) This action was commenced in the Supreme Court of the State of New York, County of New York, in April, 1953. The defendant, a domestic corporation of the State of Maryland, caused this action to be removed on the grounds of diversity of citizenship, to the United States District Court for the Eastern District of New York, where it now is pending.

5) The defendant has served no answer or pleading of any kind herein. Instead, on or about June 9th, almost three months after this action was commenced, it mailed to the plaintiff a so-called "Notice of Appointment of Arbitrators"; and thereupon on June 10th, made a motion for a stay of the prosecution of this action pursuant to the provisions of the National Arbitration Act (Section 3 of title 9, U. S. C. A.), upon the alleged grounds that the agreement annexed to the complaint contains a provision for the arbitration of the disputes raised by the allegations of the complaint. The said contract provision, which defendant claims constitutes an agreement to arbitrate, and based upon which it purportedly gave the said "Notice of Appointment of Arbitrators", is contained in the fourth sentence of Paragraph "Third" [fol. 4] of the contract annexed to the complaint, and reads as follows:

> "In the event of any dispute in the calculation of net profits under this Paragraph, Frenkil (defendant's President) shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute." (Insertion in parentheses ours)

6) Defendant's said motion for a stay pursuant to the Arbitration Act was argued before Judge Bruchhausen on October 7th, 1953, and decided by his memorandum opinion dated October 27th, 1953, copy of which is attached hereto as Exhibit "D". The order from which the appeal purports

to be taken, dated November 4th, 1953, was entered upon that opinion.

Appellee accordingly prays that this Court dismiss the appeal taken herein.

Bernard I. Scherer.

Sworn to before me this 1st day of December, 1953. Martin Hirsch, Notary Public, State of New York, No. 03-1806801. Qualified in Bronx County.

Commission Expires March 30, 1965.

[fol. 5] EXHIBIT "A" TO AFFIDAVIT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

Civil Action No. 13508

JACOB H. BODINGER, Plaintiff,

against

BALTIMORE CONTRACTORS, INC., Defendant

NOTICE OF APPEAL TO THE COURT OF APPEALS

Notice is hereby given that Baltimore Contractors, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order denying its motion for a stay of proceedings entered in this action on the 4th day of November, 1953.

Rosston, Hort and Brussell, By George Brussel, Jr., a member of the firm, 141 Broadway, New York 6, New York, Attorneys for Appellant.

Dated: November 6, 1953.

Service of copy of the above Notice of Appeal made this 30 day of November, 1953.

Bernard I. Scherer, 320 Broadway, Borough of Manhattan, New York City, Attorney for Appellee.

[fol. 6] EXHIBIT "B" TO AFFIDAVIT

At a Term of the United States District Court for the Eastern District of New York, held at the United States Courthouse, Washington and Johnson Streets, Brooklyn, New York, on 4th day of November, 1953.

Present: Hon. Walter Bruchhausen, United States District Judge.

Civil Action No. 13508

JACOB H. BODINGER, Plaintiff,

against

BALTIMORE CONTRACTORS, INC., Defendant

The defendant having moved this Court for an order (1) staying the prosecution of this action pursuant to the provisions of Section 3 of Title 9, U. S. C. A., upon the alleged grounds that the agreement annexed to the complaint and upon which this action is based contains a provision for the arbitration of the disputes raised by the allegations of the complaint herein, or (2) in the event such relief be denied that defendant be allowed twenty days after the entry of an order upon said motion within which to answer the complaint; and the said motion having duly come on to be heard before this Court on the 7th day of October, 1953;

Now, upon reading and filing the Notice of said motion dated June 10, 1953, and the affidavit thereto annexed of Victor Frenkil, verified June 9, 1953, submitted in support of said motion; and upon the affidavits of Jacob H. Bodinger verified October 5, 1953 and the affidavit of Albert E. Selenkow verified October 3, 1953, submitted in opposition [fol. 7] to said motion; and upon the reply affidavits of Victor Frenkil verified October 13, 1953, of Ernest E. Wooden, verified October 12, 1953, and of Morris Rosenberg verified October 13, 1953, submitted in further support of the said motion; and upon the rebuttal affidavits of Jacob H. Bodinger verified October 20, 1953, Roszel C. Thomsen verified October 19, 1953, Albert E. Selenkow verified October 17, 1953 and of Bernard I. Scherer and Charles Wilson verified October 20, 1953, all submitted in further opposition

to the said motion; and upon the affidavit of C. M. Zacharski, Jr., verified October 23, 1953, submitted in further support of the said motion; and upon the complaint in this action and the agreement thereto annexed, and all the papers and proceedings had herein; and after hearing Rosston, Hort & Brussel, Esqs., attorneys for the defendant, by Morris Rosenberg, Esq. of counsel, in support of the said motion, and Bernard I. Scherer, Esq. by Charles Wilson, Esq. of counsel, in opposition thereto; and due deliberation having been had; and this Court being satisfied that the contract provision upon which the said motion is based does not constitute an agreement to arbitrate, and having made and filed its decision in writing dated October 27, 1953; it is

On motion of Bernard I. Scherer, attorney for the plaintiff,

Ordered, that defendant's motion for a stay of this action be, and the same hereby is in all respects denied; and it is further

Ordered, that the defendant be allowed twenty days after [fol. 8] the entry of this order within which to answer the complaint herein.

Walter Bruchhausen, U. S. D. J.

[fol. 9] EXHIBIT "C" TO AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

JACOB H. BODINGER, Plaintiff,

against

BALTIMORE CONTRACTORS, INC., Defendant

Plaintiff, by Bernard I. Scherer, his attorney, complaining of the defendant, alleges:

First. That plaintiff is a resident of the County of Kings in the City and State of New York.

Second. Upon information and belief that at all the times hereinafter mentioned the defendant was and still is a foreign corporation, duly organized and existing under and

by virtue of the laws of the State of Maryland; and that prior hereto and on or about the 21st day of May, 1951, defendant procured from the Secretary of State of New York a certificate that defendant has duly complied with all the requirements of law to authorize defendant to do business in this State in accordance with the provisions of the General Corporation Law of the State of New York, and that since the said 21st day of May, 1951, the defendant was and still is authorized to do business in the State of New York.

Third. Upon information and belief that defendant has its office within the State of New York, in the County of New York.

Fourth. That during or about 1949, plaintiff and defendant entered into a joint venture or enterprise for the construction of an apartment house upon a plot of land bounded by University Parkway, St. Paul's Street, 34th Street and Calvert Street, in the City of Baltimore, State of Maryland, [fol. 10] owned by Parkway Realty Co. Inc. (a Maryland corporation) and to be leased to Maryland Apartments Inc., (a Maryland corporation) for a term of ninety-nine (99) years; and that agreement between the plaintiff and the defendant for the said joint venture or enterprise was finally reduced to writing on or about March 2, 1950 and was duly entered into and executed by the plaintiff and defendant, among others, on or about that date, and annexed hereto as Exhibit "I".

Fifth. That among other things in said agreement, it was duly provided and agreed between the plaintiff and defendant as follows:

> "In the event Baltimore Contractors or any other corporation or corporations owned or controlled by Baltimore Contractors and/or by Frenkil shall obtain or receive any contracts in connection with the construction of the aforementioned property, Baltimore Contractors agree to pay Bodinger twenty-five per cent (25%) of the net profits received under said contracts. Any and all fees which such corporation or corporations shall receive in connection with the aforesaid construction shall be included as part of the receipts in calculating said profits which shall be calculated in

accordance with the usual accounting practice of Baltimore Contractors. It is also understood and agreed that in calculating said net profits two per cent (2%) of all receipts is hereby agreed to be deducted as the overhead expense of Baltimore Contractors in performing the work and said percentage shall include and cover all items and costs ordinarily included in overhead in accordance with the usual accounting practice of Baltimore Contractors. In the event of any dispute in the calculation of the net profits under this Paragraph, Frenkil shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute. It is understood and agreed that Bodinger's said 25% of such net profits, if any, and only to the extent necessary, shall be used to purchase from Baltimore Contractors and/or Frenkil or the holder of such indebtedness 25% of the balance of the indebtedness and interest at face value owing by either or both Parkway Realty or Maryland Apartments at the time such net profits are determined, and any excess of the net profits not required to purchase the said 25% of the balance of the indebtedness and interest thereon shall be paid over to Bodinger or his designee."

[fol. 11] The plaintiff in the above quoted provision of said contract is designated and referred to therein as "Bodinger"; the defendant is designated and referred to therein as "Baltimore Contractors"; the defendant's President, Victor Frenkil is therein designated and referred to as "Frenkil"; the property therein designated and referred to as "property" is the property described in paragraph "second" of this complaint; and the construction referred to in the said paragraph of said contract is the construction of the aforesaid apartment building.

Sixth. That thereafter and as contemplated by the said contract between plaintiff and defendant, a general contract for the construction of the said apartment building was given to the defendant Baltimore Contractors, Inc., which completed the construction of the said apartment building during or about November, 1951.

Seventh. That the plaintiff has duly performed all the terms and conditions of the said contract between plaintiff and defendant on plaintiff's part to be performed.

Eighth. That by reason of the said contract between plaintiff and the defendant, plaintiff became, upon the completion of the said apartment building, and still is, entitled to receive from the defendant, Baltimore Contractors, Inc., twenty-five (25%) of the net profits received and derived by the defendant, Baltimore Contractors, Inc. and any other corporation controlled by the defendant and or its president, Victor Frenkil, in connection with the said construction.

Ninth. That plaintiff heretofore duly requested and demanded of the defendant, Baltimore Contractors, Inc., an accounting of and for the said profits and the right to an inspection and audit of the books and records concerning the said construction, but that defendant failed and refused to furnish plaintiff with any full, proper or adequate accounting.

[fol. 12] Tenth. That although defendant subsequent to November 15, 1951 at first permitted plaintiff's accountant to commence upon an audit of the books and records of the defendant with reference to the said construction, defendant terminated the said audit and inspection and refused permission for the same to continue without just cause before any substantial portion of the said audit and inspection could be accomplished by plaintiff's accountant.

Eleventh. That thereafter and during or about April 1952, plaintiff received from the defendant a single sheet entitled "Baltimore Contractors, Inc., Tentative Calculations of Cost and Profit on job No. 3220, Maryland Apartments, Inc., March 14, 1950 to December 31, 1951", and in May, 1952, defendant sent to plaintiff a similar sheet with the word "tentative" omitted from the sheet title and a note appended to the bottom indicating that the statement was "subject to further adjustments relating to additional items of cost or credits arising either prior to or subsequent to December 31, 1951." Neither of said statements were signed or certified to by any one; and both were so general, containing only lump sums for large and important items, as to prevent plaintiff from ascertaining therefrom what items

were included in the said general totals and whether or not any of said items were proper or should be disputed or disallowed, and further, both the said statements upon their face showed that neither thereof purports to be a full, complete and proper accounting.

Twelfth. That thereafter defendant, refusing to permit plaintiff's original accountant to complete his audit and inspection of the books and records of the defendant pertaining to the said construction required the plaintiff to employ new accountants for the purpose of making such an audit and although the defendant thereafter permitted such new accountants to examine some of the records of the defendant [fol. 13] in connection with the said construction, it refused permission to the said accountant to examine other material books and records of the defendant which are material and relevant to and necessary for the completion of a proper audit of the profits of the said construction and for a complete ascertainment and determination of the amount of such profits.

Thirteenth. That the said partial audit and inspection which plaintiff's new accountants were permitted to make as aforesaid, together with other information of which plaintiff is informed and verily believes, nevertheless, disclosed the following methods and practices employed by the defendant in setting up alleged costs to be deducted from the profits of the said construction, in an attempt to conceal the amount which plaintiff was and is entitled to receive under the aforesaid contract between the plaintiff and the defendant.

a) That Eden Industries, Inc., (a Maryland Corporation), which upon information and belief, is substantially controlled by or a "dummy" for the defendant and or its president, Victor Frankil, was used by the defendant as the ostensible sub-contractor for the painting work performed as part of the said construction, and, in turn, the said Eden Industries, Inc., sub-contracted the said work to the actual contractor which was entitled to perform the said painting work and with whom the defendant had directly negotiated the said painting work; and that, upon information and belief, the said Eden Industries, Inc. performed no real function whatsoever in connection with the said business

and was received so used to inflate the actual cost of said job and to conceal a substantial part of the profits of said job and deprive the plaintiff of his share thereof; and, upon information and belief, that the said Exeen Industries, Inc., received as a profit from the said job, the sum of Twenty-eight Thousand ($28,000.00) Dollars which sum is not a true cost of the said construction work, although it is recorded as such in the books and records of the defendant. [fol. 14] b) The defendant charged against the said job the full cost of certain equipment purchased by the defendant during the said construction and retained by the defendant after the completion of said construction, although the said equipment continued to be of substantial value after the completion of the said construction, and, upon information and belief, was being used by the defendant on other work of the defendant with which plaintiff was not concerned, without allowing any credit to the construction cost herein involved for the continued value or use of said equipment.

c) That the defendant purchased various material in quantities substantially in excess of those required for the construction herein involved and removed such excess quantities of materials to defendant's own storage yards and upon information and belief used the same on other jobs with which plaintiff had no connection, without crediting the cost of construction herein involved with the value of such excess materials.

d) That the books and records of the defendant with respect to the costs of said construction work failed to record as credits against such costs a rebate received by defendant from one of its sub-contractors in the sum of Thirty-four Thousand Eight Hundred Forty-three and 73/100 ($34,843.73) Dollars of the sum received by such sub-contractor in connection with the said construction work.

e) That the books and records of the defendant with respect to the costs of said construction work failed to record as credits against such costs a rebate in the sum of Twenty Thousand ($20,000.00) Dollars paid and to be paid by Moss-Rouss Company in connection with the said property.

f) That the defendant made a practice of charging as costs of the said construction rental charges for equipment owned

by the defendant at rates which were substantially, if not [fol. 15] entirely, a profit to the defendant without allowing any credit for such profit against such costs or to the plaintiff in computing his share of such profits, i.e., so that rental charges of $60.00 were made for one burning outfit which retails for from $69.45 to $8[illegible].45.

g) That the defendant made a practice of charging as a cost of said construction an arbitrary amount or percentage for the workmen's compensation and liability insurance premiums, which amount, the defendant refuses to itemize or substantiate to plaintiff or his accountants; and defendant refuses to reveal or exhibit the policies and other records which would show the actual costs of such workmen's compensation and liability insurance premiums.

h) That the defendant charged to the costs of said job certain items which were properly includable in the overhead charge for which the defendant was allowed a general charge of two (2%) per cent as provided in the said contract.

i) That the defendant charged as costs of this job certain amounts for alleged payments by the defendant which were not proper costs of the job.

Fourteenth. Upon information and belief, that the defendant in breach and violation of the terms of the aforesaid contract between the plaintiff and defendant, and for the purpose of depriving the plaintiff of his rightful share of the profits of said construction as provided in the said contract, did inflate the amount of said costs by substantial sums in excess of their true amount and did conceal, and divert from the income and profits of the said job, sums in which plaintiff is entitled to participate under the terms of said contract and that both the purported statements sent to plaintiff by defendant, as alleged in paragraph "eleventh" herein, reflected and were based upon the overstatement of costs and concealment of profits shown in paragraph "thir- [fol. 16] teenth" hereof.

Fifteenth. That defendant has further breached and violated the terms and conditions of the aforesaid contract by failing and refusing to fully account to the plaintiff for his share of the said profits and by refusing to permit plaintiff to make a full and complete audit and inspection of defendant's books and records relating to the same.

Sixteenth. That although duly demanded by plaintiff of the defendant, defendant has refused to give plaintiff a due and full account of such joint venture and enterprise and of the profits to which the plaintiff is entitled under the aforesaid provision of said contract and defendant still refuses to give the same, and that plaintiff can not determine the amount due him in connection with the said joint venture and enterprise and profits without such accounting by the defendant.

Seventeenth. That plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment against the defendant:

1. That the rights of the plaintiff in the said joint venture and enterprise and the profits thereof be established;

2. That the defendant be compelled to account to plaintiff for such joint venture and enterprise and the profits thereof;

3. That judgment be awarded in favor of the plaintiff and against the defendant for the amount due the plaintiff in connection with such joint venture and enterprise and for his share of the profits thereof;

[fol. 17] 4. That the plaintiff have such other and further relief as may be just and proper, together with costs and disbursements.

Bernard I. Scherer, Attorney for Plaintiff, Office & P. O. Address, 320 Broadway, Borough of Manhattan, City of New York.

Verified 4/25/53 by pl.

[fol. 18] EXHIBIT "1" TO EXHIBIT "C"

6-MR-1/24/50

This Agreement, made this 2nd day of March, 1950, between Victor Frenkil, of the City of Baltimore, State of Maryland, hereinafter sometimes referred to as "Frenkil", Baltimore Contractors, Inc., a Maryland corporation hereinafter sometimes referred to as "Parkway Realty", Maryland Apartments, Inc., a Maryland corporation hereinafter

sometimes referred to as "Maryland Apartments", and Jacob H. Bodinger, of the City of New York, State of New York, hereinafter sometimes referred to as "Bodinger".

Preliminary Statement

1. Baltimore Contractors, the controlling part of whose outstanding shares of stock is owned by Frenkil, has purchased and transferred to Parkway Realty, Inc., a Maryland corporation recently organized by Frenkil, the lot of ground bounded by University Parkway, St. Paul Street, 34th Street and Calvert Street, in the City of Baltimore, State of Maryland.

2. Parkway Realty will grant and assign to Maryland Apartments, under a Federal Housing Administration approved ninety-nine year ground rent lease the portion of the aforedescribed property which is more particularly described in Exhibit A attached hereto, upon which said portion of land is to be constructed what is known as an FHA elevator type apartment building or buildings, the mortgage financing of which is to be arranged in accordance with Section 608 of the National Housing Act, as amended, and said activities shall hereinafter be called the "project".

3. The remaining portion of the said plot retained by Parkway Realty is to be used or disposed of as the said [fol. 19] corporation hereafter may determine.

4. Bodinger, under Frenkil's direction, is to assist, operate and supervise the development and consummation of the said FHA project, and to act in furthering the interests of Parkway Realty, Maryland Apartments and Baltimore Contractors.

5. If any further financing, advances or loans may be required by Parkway Realty or Maryland Apartments, it is understood that Frenkil and/or Baltimore Contractors may, but are not obligated to, provide the same.

6. The purpose of this agreement is to record and bind the agreements heretofore reached between the parties hereto.

Agreement

Now, therefore, in consideration of the foregoing and One Dollar ($1.00) and other good and valuable considera-

tions and the mutual undertaking of the parties, it is agreed as follows:

First. In consideration of the conveyance by Baltimore Contractors to Parkway Realty of the lot of ground referred to in Paragraph "1" of the "Preliminary Statement", Parkway Realty shall be indebted to Baltimore Contractors in the sum of One Hundred Fifty-two Thousand Five Hundred Dollars ($152,000.00) (that being the price paid by Baltimore Contractors for the said property), plus all expenses incurred by Baltimore Contractors in acquiring said property and conveying the same to Parkway Realty; and Parkway Realty shall also be indebted to Baltimore Contractors for such additional disbursements as Baltimore Contractors has made on its behalf. The aforesaid ninety-nine year lease, as and when it is created, shall be transferred and conveyed to Baltimore Contractors as security for the payment of the aforesaid purchase price of One hundred fifty-two thousand Five hundred Dollars ($152,-500), it being understood, however, that the said purchase [fol. 20] price shall become due and payable only as provided in subdivision (b) of Paragraph First hereof. Parkway Realty shall issue all of its authorized capital stock which shall be of no par value for the following cash consideration: 75% of said shares of stock to Baltimore Contractors and/or Victor Frenkil and/or their respective designees in such proportions as they may designate upon payment of the sum of $30.00 as the purchase price for said 75% of said shares of capital stock; and the remaining 25% of said shares of capital stock to Bodinger or his designees upon the payment of the sum of $10.00 as the purchase price therefor. The holder or holders of the 25% of the capital stock of Parkway Realty to be issued under this Paragraph to Bodinger or his designees shall have the right to purchase 25% of any additional capital stock of Parkway Realty, the issuance of which may be from time to time authorized, upon the same terms and conditions as the other 75% of such additional stock is issued.

(a) Parkway Realty shall pay interest at four per cent (4%) per annum to Baltimore Contractors on the aforesaid purchase price and other indebtedness already owing by it to

Baltimore Contractors, and on any further loans, advances or financing which Frenkil and/or Baltimore Contractors may provide (all of which purchase price and other indebtednesses shall hereinafter be referred to as the "indebtedness"), and said interest shall accrue from the respective dates on which the indebtedness is incurred.

(b) Parkway Realty shall repay to Baltimore Contractors and/or Frenkil the indebtedness, as soon as, and to the extent that, Parkway Realty shall have funds available to repay the same; provided, however, that if ninety days have elapsed after the receipt of the last and final payment under the National Housing Act insured mortgage which is to be placed on the project, and the indebtedness has not [fol. 21] been paid in full with interest, and it then becomes necessary to use all or a part of Bodinger's share of the net profits, if any, for the purchase of a portion of said indebtedness in the manner prescribed by Paragraph Third hereof, then the balance of the indebtedness with interest shall immediately become due and payable to the holders thereof; provided, further, that if Bodinger or his designees thereupon or prior thereto shall, have purchased an amount equal to 25% of the unpaid indebtedness either by the use of his share of the profits in accordance with Paragraph Third or by other funds, then the entire balance of the indebtedness shall not become due unless and until Bodinger shall consent thereto in writing. However, Parkway Realty shall nevertheless continue to repay the balance of the indebtedness with interest as soon as and to the extent that Parkway Realty shall have funds available to make payments thereon, all payments to be in a pro rata basis, viz: 25% of such payments to Bodinger or his designees and 75% to Baltimore Contractors and/or Frenkil or their respective designees as the holders of the other 75% of said indebtedness. Bodinger or his designees shall have an absolute right to purchase such 25% of the balance of the indebtedness at the face value thereof plus accrued interest, and on exercising that right he and his designees shall be entitled to the benefit of their proportionate share of any security that has been given for such indebtedness.

Second. Maryland Apartments shall issue all of its authorized capital stock which shall be of no par value (except

those preferred shares required by the Rules and Regulations of the Federal Housing Administration to be issued to the Federal Housing Administrator) for the following cash consideration: 75% of said shares of capital stock to Baltimore Contractors and/or Victor Frenkil and/or their respective designees in such proportions as they may desig- [fol. 22] nate upon payment of the sum of $30.00 as the purchase price for said 75% of said shares of capital stock; and the remaining 25% of said shares of capital stock to Bodinger and/or his respective designees upon payment of the sum of $10.00 as the purchase price therefor. The holder or holders of the 25% of the capital stock of Maryland Apartments to be issued under this Paragraph to Bodinger or his designees shall have the right to purchase 25% of any additional capital stock of Maryland Apartments, the issuance of which may be from time to time authorized, upon the same terms and conditions as the other 75% of such additional stock is issued.

(a) All indebtedness which shall become owing by Maryland Apartments to Frenkil and/or Baltimore Contractors for financing loans or advances provided or made by them (hereinafter referred to as the "indebtedness") shall bear interest at four percent (4%) per annum accruing from the dates on which the indebtedness is incurred, and the indebtedness shall be repaid by Maryland Apartments as soon as, and to the extent that, it shall have funds with which to pay the same; provided however, that if ninety days have elapsed after the receipt of the last and final payment under the National Housing Act insured mortgage which is to be placed on the project, and the indebtedness has not been paid in full with interest, and it then becomes necessary to use all or a part of Bodinger's share of the net profits, if any, for the purchase of a portion of said indebtedness in the manner prescribed by Paragraph "Third" hereof, then the balance of the indebtedness with interest shall immediately become due and payable to the holders thereof; provided further, that if Bodinger or his designees thereupon or prior thereto shall have purchased an amount equal to 25% of such unpaid indebtedness, either by the use of his share of the profits in accordance with Paragraph Third or [fol. 23] by other funds, then the entire balance of the in-

debtedness shall not become due unless and until Bodinger shall consent thereto in writing. However, Maryland Apartments shall nevertheless continue to repay the balance of the indebtedness with interest as soon as and to the extent that Maryland Apartments shall have funds available to make payments thereon, all payments to be on a pro rata basis, viz: 25% of such payments to Bodinger or his designees and 75% to Baltimore Contractors and/or Frenkil or their respective designees as the holders of the other 75% of said indebtedness. Bodinger or his designees shall have an absolute right to purchase such 25% of balance of the indebtedness at the face value thereof plus accrued interest, and on exercising that right he and his designees shall be entitled to the benefit of their proportionate share of any security that has been given for such indebtedness.

Third. In the event Baltimore Contractors or any other corporation or corporations owned or controlled by Baltimore Contractors and/or by Frenkil shall obtain or receive any contracts in connection with the construction of the aforementioned property, Baltimore Contractors agrees to pay Bodinger twenty-five percent (25%) of the net profits received under said contracts. Any and all fees which such corporation or corporations shall receive in connection with the aforesaid construction shall be included as part of the receipts in calculating said profits which shall be calculated in accordance with the usual accounting practice of Baltimore Contractors. It is also understood and agreed that in calculating said net profits two percent (2%) of all receipts is hereby agreed to be deducted as the overhead expense of Baltimore Contractors in performing the work and said percentage shall include and cover all items and costs ordinarily included in overhead in accordance with the usual accounting practice of Baltimore Contractors. In the event [fol. 24] of any dispute in the calculation of the net profits under this Paragraph, Frenkil shall select either Wooden and Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute. It is understood and agreed that Bodinger's said 25% of such net profits, if any, and only to the extent necessary, shall be used to purchase from Baltimore Con-

tractors and/or Frenkil or the holder of such indebtedness 25% of the balance of the indebtedness and interest at face value owing by either or both Parkway Realty or Maryland Apartments at the time such net profits are determined, and any excess of the net profits not required to purchase the said 25% of the balance of the indebtedness and interest thereon shall be paid over to Bodinger or his designee.

Fourth. Bodinger shall give such part of his time as may be necessary to the successful prosecution of the project and shall serve in furtherance of the interests of Parkway Realty, Maryland Apartments, Baltimore Contractors and any other corporation or corporations formed in connection with additional construction on or development of the remaining portion of the aforementioned property, his duties to include executive direction of architecture, engineering, construction and all other incidental services necessary to the successful completion of the project, and as a salary while he is so engaged, he shall receive from the corporation or corporations to which or for which his said services are rendered, Fifteen thousand Dollars ($15,000.00) per annum, payable monthly, commencing retroactively from May 15, 1949, when he entered upon such services. Bodinger's said services may be terminated on May 15, 1950 in which event his salary shall cease, provided, however, that in the event of such termination of his services, Bodinger's rights under this agreement, except as to such $15,000 annual salary, shall not be affected by such termination of services but shall continue in full force and effect. [fol. 25] If such one year salary shall not be paid to Bodinger, as and when it becomes due, then Frenkil and/or Baltimore Contractors agree to lend to the corporation or corporations which are to pay such salary, the amount needed to pay the same.

Fifth. Frenkil shall receive for his services in connection with construction on and development of the property referred to in this agreement Fifteen thousand ($15,000) on or before May 15, 1954, in such instalments as may be determined, from the corporation or corporations in behalf of which such services shall have been rendered.

Sixth. Except as hereinabove expressly provided with respect to the salaries of Bodinger and Frenkil, no salaries

shall be paid by either Parkway Realty or Maryland Apartmentss to any of their officers, unless Bodinger shall consent thereto in writing. Nor shall compensation be paid to any employee of said corporations except reasonable compensation for services actually rendered and reasonably necessary in prosecuting the affairs of such corporation.

Seventh. In the event one or more other corporations are formed or caused to be formed by any of the parties hereto, for the purpose of additional construction upon or development of the remaining portion of the aforementioned property, Bodinger or his designees and Frenkil or his designees are to receive the same rights respectively in such corporation or corporations as are given to them by the provisions of this agreement with respect to Maryland Apartments.

Eighth. In the event changes in the corporate structure of either Parkway Realty or Maryland Apartments are required in furtherance of the project under the National Housing Act or are desirable taxwise, it is understood and agreed between the parties hereto that such changes may [fol. 26] be made provided the intent and purpose of this agreement are not invalidated.

Ninth. Baltimore Contractors and/or Frenkil agree that the stock respectively issued to them or either of them in Maryland Apartments and Parkway Realty shall be so voted as to elect Bodinger a director of each such corporation as long as he or his designees owns a 25% capital stock interest in both said corporations.

Tenth. The parties hereto shall take such action as may be necessary to carry out or perform any of the matters or things required or intended by the provisions of this agreement.

Eleventh. The certificates of stock of Parkway Realty and Maryland Apartments shall have inscribed thereon the following:

> "This certificate and the shares herein referred to are subject to the provisions of an agreement dated January, 1950, made between Victor Frenkil, Baltimore Contractors, Inc., Parkway Realty, Inc., Maryland Apartments, Inc., and Jacob H. Bodinger, a copy of which is on deposit with the respective secretaries of Maryland Apartments and Parkway Realty and may be

inspected upon request by the respective stockholders of said corporations."

Twelfth. This agreement shall inure to the benefit of and be binding upon the designees, heirs, successors, personal representatives, transferees and assigns of the respective parties hereto.

In witness whereof, the parties hereto have executed this agreement the day and year first above written.

Victor Frenkil. (Seal.)

Attest as to Victor Frenkil: Virginia Lambrow (Sgd.)
Baltimore Contractors, Inc., by J. P. Frenkil, Vice-President.

Attest: A. H. Graham, Secretary.
Parkway Realty, Inc., by Dulany Foster, President.

Attest: A. H. Graham, Secretary.
[fol. 27] Maryland Apartments, Inc., by Dulany Foster, Vice President.

Attest: A. H. Graham, Secretary.

Jacob H. Bodinger.

Attest as to Jacob H. Bodinger, Wm. D. Potts.

[fol. 28] EXHIBIT "D" TO AFFIDAVIT

Civil #13508

Oct. 27, 1953

Memorandum

"Defendant moves for a stay of this action pursuant to the statute (9 U. S. C. A. 3), authorizing such stay 'upon any issue referable to arbitration under an agreement in writing for such arbitration.

Plaintiff by his complaint seeks an accounting and other relief in connection with an agreement entered into between the parties. The issue before this Court is the construction of paragraph "third" of the agreement, par-

ticularly whether it was the intention of the parties that disputes arising thereupon be determined by arbitration. The paragraph in part, reads:

> 'In the event of any dispute in the calculation of the net profits under this paragraph, Frenkil (referring to the defendant's president) shall select either Wooden or Benson or Haskins and Sells or an accountant or auditor named by either of them whose determination of all such disputes shall be final and binding upon all parties to the dispute.'

The Court commends counsel for their able presentation of the matter and after careful examination and consideration of the papers and briefs submitted by them, concludes that it was not the intention of the parties that paragraph "third" of the agreement should constitute an agreement to arbitrate and accordingly denies the motion.

Walter Bruchhausen, U. S. D. J."

[fol. 29] In the United States Court of Appeals for the Second Circuit

Endorsement Granting Motion to Dismiss—December 11, 1953

Motion granted. See Morgantown vs. Royal Ins. Co., 337 U. S. 254. H. B. C., A. N. H., H. R. M., U. S. C. JJ

[fol. 30] United States Court of Appeals for the Second Circuit

[Title omitted]

Proposed Order Granting Stay

Appellant having applied to this court for an order staying the operation of the order of this court granting appellee's motion to dismiss the appeal taken herein from an order of the United States District Court, for the Eastern

District of New York, denying appellant's motion for a stay of this action pending arbitration under the Federal Arbitration Act, and said application having duly come on before the Hon. —— ——, one of the Judges of this Court, and after hearing George Brussel, Jr., of counsel, in support of said application and upon reading the affidavit of George Brussel, Jr., in support thereof, it is

Ordered, that all the proceedings by plaintiff-appellee under the order of this Court dated December 11, 1953 dismissing the appeal herein, be and they hereby are stayed pending final determination of an application by appellant to the Supreme Court for a writ of certiorari directed to this court in respect of such order of dismissal, provided that appellant shall file its application for such writ within — days after the date of this order.

Dated New York, N. Y., December —, 1953.

—— ——, Circuit Judge.

[fol. 31] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AFFIDAVIT OF GEORGE BRUSSEL, JR., IN SUPPORT OF STAY

STATE OF NEW YORK
County of New York, ss.:

George Brussel, Jr., being duly sworn, deposes and says:

1. I am a member of the firm of Rosston, Hort & Brussel, attorneys for Defendant-Appellant herein. This is an application by Defendant-Appellant for an order staying an order of this Court dismissing an appeal to this court by Defendant-Appellant herein, pending application to the Supreme Court for a writ of certiorari in respect of such dismissal.

2. Deponent makes this affidavit because the question involved is merely procedural and because deponent's client is a resident of Maryland and its officers are not available to execute an affidavit.

3. The order which defendant-appellant will seek to have reviewed, by the Supreme Court, was made by this Court

on December 11, 1953. It granted appellee's motion to dismiss appellant's appeal from an order of the District Court denying appellant's motion for a stay of this action pending arbitration under the Federal Arbitration Act.

[fol. 32] 4. This is an action for an accounting instituted in the United States District Court for the Eastern District of New York. The action is founded on a contract between the parties containing a clause which, in the opinion of counsel for the appellant, is the equivalent of an agreement to arbitrate the particular grievances asserted in the complaint. The case is not at issue, the motion for a stay having been made before answer.

5. Appellant moved in the District Court for a stay of further proceedings herein pending arbitration under the Federal Arbitration Act. The motion was denied by Judge Walter Bruchhausen who subsequently made an order staying the appellee from further proceedings herein pending an appeal to this Court theretofore taken by the appellant from such order.

6. Appellee then moved in this Court to dismiss the appeal contending that the order denying the stay is not appealable. This Court, on December 11, 1953, made an order granting the motion to dismiss, its decision consisting of the following:

> "Motion (to dismiss appeal) granted. See Morgantown vs. Royal Insurance Co., 337 U. S. 254".

7. Appellant intends to apply to the Supreme Court for a writ of certiorari directed to this Court to review said order. In this application appellant will contend, among other things, that the Morgantown case is actually authority for a denial of the motion to dismiss the appeal; that in the case at bar the denial by the District Court of the motion for a stay pending arbitration, is equivalent to a stay of the arbitration, and that such a stay constitutes an intervention by a court of equity against a wholly independent [fol. 33] proceeding at law, namely, the quasi-judicial proceeding represented by a Federal statutory arbitration.

8. In the Morgantown case, appellant appealed from the dismissal by the Fourth Circuit Court of Appeals of an appeal from an order directing a prior trial of an equitable

defense in an action at law otherwise triable by a jury. The Circuit Court dismissed the appeal upon the ground that the order was not appealable and the Supreme Court affirmed, pointing out that, in that case, the denial of a prior jury trial was not equivalent to the enjoining of a pending action at law by a court of equity. The affirming judges left untouched earlier decisions of the Supreme Court (*Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, and *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188) which involved actions on insurance policies ordinarily triable by jury. The defendants in both of those cases procured an order staying the proceedings at law pending the trial of later-begun equitable proceedings based upon defenses of fraud against the contract sued upon. The Supreme Court, in both cases, held that these orders were the equivalent of orders granting an injunction and were appealable as of right.

9. Appellant submits that, in the case at bar, we have precisely the same situation for, in this case, the arbitral proceedings (which were actually commenced by appellant's notice and demand to proceed with arbitration), are, for the purposes of this question, the equivalent of judicial proceedings at law, and the effect of a denial of a stay of this action pending the completion of such proceeding is the equivalent of an injunction against them. This point, while referred to obliquely in a question put to counsel by Judge [fol. 34] Medina on the argument, was not passed upon or decided by this Court, and, so far as counsel are able to determine, has never been decided by any other Court of Appeals or by the Supreme Court.

10. Upon the application for certiorari it will also be urged that the Supreme Court has never reviewed the precise question passed upon in this case, namely, whether an order of a court in a suit for an accounting, denying a motion for stay pending arbitration, is or is not appealable as a matter of law. All other Supreme Court cases dealing with the problem have involved either admiralty actions or cases in which the stay was granted. Upon the application for the writ it will be urged, that, in the former class of cases the Supreme Court decisions turned on the Admiralty Court's lack of equity powers and that, in the

latter class of cases, the granting of the stay failed to present the irreparable injury inherent in the case at bar where appellant, at great cost and expense, will be compelled to litigate 200 miles from its place of business instead of proceeding in arbitration in the city in which it maintains its principal office.

11. It will also be urged that, in the light of these considerations, the effect of this Court's decision will be to frustrate the policy of the Federal Arbitration Act and to deny to appellant a substantial right granted to it by statute to its great and irreparable damage.

12. I have advised appellant that the contemplated application to the Supreme Court has substantial merit, and appellant is prepared to prosecute it, in good faith, with diligence and dispatch.

[fol. 35] 13. Unless this court grants a stay appellant will be in default in answering the complaint. Its time to answer has not been extended by order or stipulation.

14. Appellant's solvency is not questioned. In granting appellant's motion for a stay in the District Court pending appeal to this Court, the District Court so found.

15. Appellant has made no previous application to this Court or any other court for this relief.

Wherefore, appellant prays for an order staying all proceedings by plaintiff-appellee under the order of this Court dismissing this appeal, pending final determination of appellant's application to the Supreme Court for a writ of certiorari, and for such other relief as may be just.

Sworn to before me, this 15th day of December, 1953.

George Brussel, Jr.

[fol. 36] In United States Court of Appeals

Endorsement Denying Stay—December 16, 1953

Motion denied.

H. B. C., A. N. H., H. R. M., U. S. C., JJ.

Dec. 16, 1953.

[fol. 37] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF BERNARD I. SCHERER IN OPPOSITION TO STAY

STATE OF NEW YORK,
County of Kings, ss:

Bernard I. Scherer, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff-appellee herein, and make this affidavit in opposition to defendant-appellant's application for a stay of the order of this Court dismissing the appeal herein, pending application to the Supreme Court for a writ of certiorari.

2. The papers on this application were handed to me yesterday afternoon at 3:40 P. M. as we were about to enter the court room of this Court to oppose this application, of which we had previously received telephone notification. Since we understand these papers will be submitted to the Judges who decided the motion to dismiss the appeal before 11:00 A. M. today, this affidavit necessarily will be most brief.

3. It is difficult to understand from a reading of the supporting affidavit of defendant-appellant's attorney, just what its contention is. However, it can be gathered that defendant-appellant's argument completely ignores what the Supreme Court actually did hold in the following cases:

Enelow v. N. Y. Life Ins. Co., 293 U. S. 379;
[fol. 38] Shanferoke C. & S. Corp. v. Westchester S. Corp., 293 U. S. 449;
Schoenamsgruber v. Hamburg American Line, 294 U. S. 454;
Ettelson v. Metropolitan Life Ins. Co., 317 U. S. 188;
Morgantown v. Royal Ins. Co., 337 U. S. 254.

All these cases made it plain that a stay is appealable as the equivalent of an injunction only when it constitutes the intervention by a Court of equity in an action at law. The stay sought in this case cannot by any process of distorted reasoning be fitted into the requirements of the said Rule.

The Morgantown case made it plain that the aforesaid requirements cannot be deviated from one iota; and certainly the Shanferoke and the Schoenamsgruber decisions made it clear that an application for a stay pursuant to the Arbitration Act was not *per se* appealable as an injunction, but required the precise setting of the Enelow case (viz. an application based on an equitable defense to stay an action at law), to constitute the stay as the equivalent of an interlocutory injunction.

4. We feel that any further discussion of the proposed application by defendant-appellant for a writ of certiorari should not be required in view of the full consideration given by this Court to this very point in the motion to dismiss the appeal decided by this Court last Friday (December 11th, 1953).

5. The application for a stay is further opposed on the grounds that it is merely the latest of a series of steps taken by the defendant-appellant to delay the prosecution of this action. This talent of defendant for delay finds its highest testimonial in the fact, that although almost eight months have elapsed since this action was commenced, defendant has succeeded up to this very moment in avoiding serving [fol. 39] an answer—thereby preventing plaintiff from even noticing this case for trial and progressing on an equity calendar that is more than one year behind in the United States District Court for the Eastern District of New York.

6. Most aggravating about this withholding by defendant of an answer is the fact that it served no good purpose. The interposition of an answer by defendant would not have affected in any respect any of the rights claimed by the defendant in this action—whether to arbitration or otherwise. The only purpose accomplished by the withholding of an answer is the delay of the action—and in that defendant has been most successful.

7. This application is further opposed on the ground that defendant has shown no need for any stay. It can have its proposed application for a writ of certiorari disposed of long before this case can be reached for trial. Defendant has not shown any prejudice which would result from a denial of the stay; and certainly there can be none which would be disproportionate to the prejudice plaintiff would

suffer by the further delay of this action if a stay were granted.

8. Defendant's appeal was dismissed upon the grounds that it was premature—that the appeal could be had only from a final judgment herein. On that ground defendant should seek to hasten the final judgment in this action, so that it can have its appeal—instead of compounding the delays in this case by stay upon stay.

Wherefore, it is prayed that the stay sought by defendant-appellant be denied on the following grounds:

1. That the proposed application for certiorari is completely without merit.

2. That the stay is sought merely for the purposes of delay.

[fols. 40-41] 3. That the defendant has shown no need for a stay which, if granted, would prejudice plaintiff.

Sworn to before me this 16th day of December, 1953.

Bernard I. Scherer.

[fols. 42-43] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR STAY—December 16, 1953

A motion having been made herein by counsel for appellant for a stay pending an application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Alexander M. Bell, Clerk.

[fol. 44] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 626

BALTIMORE CONTRACTORS, INC., Petitioner,

vs.

JACOB H. BODINGER

ORDER ALLOWING CERTIORARI—Filed April 12, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.